Single Bench

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

CRIMINAL APPEAL NO. 619 /2005 [S.B.]

APPELLANT **[In custody]**	:-	Shiv Kumar S/o Singhji Nayak, aged about 33 years, R/o Pachpedi, P.S. Out Post Pachpedi, P.S.Pachpedi, District Bilaspur [C.G.].
	VERSUS	
RESPONDENT	:-	State of Chhattisgarh.

CRIMINAL APPEAL UNDER SECTION 374[2] OF CRIMINAL PROCEDURE CODE.

CONVICTION	**SENTENCE**

(31)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.619/2005

Shiv Kumar

Vs.

State of Chhattisgarh

Post for orders : 27.03.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

A.F.R.

(32)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 619/2005

Shiv Kumar

Vs.

State of Chhattisgarh.

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Present:
Shri N.K.Chatterjee, learned counsel for the appellant.
Shri U.K.S.Chandel, P.L. for the State.

J U D G M E N T

(Delivered on 27th day of March 2006)

This appeal is directed against the judgment dated 27.07.2005 delivered by Shri A.K.Pradhan, Special Judge (Narcotics), Bilaspur in Special Criminal Case No.29/2004 whereby the appellant was convicted under Section 20(b)(ii)(B) of the Narcotic Drugs and Psychotropic Substances Act 1985 (hereinafter referred to as 'the Act') and was sentenced to undergo R.I. for three years and a fine of Rs.10,000/-, in default of payment of fine to undergo additional R.I. for six months.

2. Briefly stated the prosecution story is that on 8.6.2004 at about 3.30 P.M. Sub-Inspector N.S.Dhritlahre P.W.2 of outpost Pachpedi, Police Station Mastoori upon receiving secret information that the appellant was in possession of *ganja* for the purpose of sale at his residence in Pachpedi Nayak Tand locality, recorded the said information and proceeded to the house of the appellant along with witnesses Shyamlal P.W.6 and Harprasad. A search of house of the

(33)

appellant was conducted at 5.00 P.M. and in one of the rooms 5 kilograms *ganja* like substance kept inside a plastic cement bag was recovered. On weighment of the articles the substance weighed 5 kilograms. Two samples of 25 grams each were taken and were sealed. The remaining substance was also seized. The aforesaid articles were handed over to Head Constable Amritlal P.W.5 for safe custody and were kept at the *Malkhana* vide Ex.P.27-A. On 10.6.2004 one of the samples was sent through Constable Vijay Kumar P.W.2 to the Forensic Science Laboratory. Vide report Ex.P.28 dated 24.07.2004, the F.S.L. opined that the sample packet contained *ganja.* After completion of investigation prosecution was launched against the appellant.

3. The appellant abjured the guilt, pleaded innocence and led evidence of Raj Kumar D.W.1 in defence. The prosecution examined as many as 6 witnesses. Relying upon the evidence led by the prosecution, the learned trial judge convicted and sentenced the appellant as aforesaid in paragraph 1.

4. Shri N.K.Chhatterjee, learned counsel for the appellant has contended that the remaining sample packet and the other substance which were alleged to have been seized from the appellant and sealed were not produced in Court, as was seen from the order sheet dated 17.8.2004. The *Malkhana* register Ex.P.27-A did not show that the two sample packets or the remaining substance were entrusted at the *Malkhana* in a sealed condition. There was total non-compliance of Section 55 of the Act since no evidence was led by the prosecution to show that the S.H.O. of outpost Pachpedi had affixed his seal on the two sample packets or the remaining substance. The specimen impression of the seal was also not sent to the F.S.L. for comparison.

(34)

Independent witness Shyamlal P.W.6 did not support the prosecution and other witness Harprasad was not examined by the prosecution. Lastly, it was contended that the prosecution led no evidence to show that the *ganja* was in the exclusive conscious possession of the appellant since Ex.P.29, a certificate from In-charge Sarpanch of Pachpedi clearly revealed that the house from where the *ganja* was alleged to have been seized was the ancestral house of the appellant in which he lived with his family members. On this ground, learned counsel for the appellant prayed that the conviction and sentence awarded by the trial Judge should be set aside.

5. On the other hand, Shri U.K.S.Chandel, learned Panel Lawyer argued that there was substantial compliance of the provisions of Section 55 of the Act by Sub-Inspector N.L. Dhritlahre P.W.2. He further argued that the provision of Section 55 of the act is directory in nature and non-compliance thereof by itself did not vitiate the prosecution. Placing reliance on the testimony of Sub-Inspector N.L.Dhritlahre and the report of F.S.L. Ex.P.28 he submitted that the conviction of the appellant and sentence awarded were well founded and did not call for any interference.

6. Having heard rival contentions, I have perused the record. In a case under Section 20(b)(ii)(B) of the act it is the bounden duty of the prosecution to prove beyond the shadow of any doubt that the substance which had been examined by the F.S.L. was the same which had been seized from the appellant and that there was no possibility of tampering with the same. Shyamlal P.W.6 who was an independent witness of the seizure stated that his signatures on all documents were taken at the Police Station and *ganja* like substance was shown to him by the police. He specifically denied that *ganja* like substance was seized from the appellant. Harprasad, another independent

witness though cited by the prosecution was not even included in the trial programme given by the Assistant Public Prosecutor and consequently was not examined. The testimony of Sub-Inspector N.L.Dhritlahre P.W.2 that he had sealed the two samples of 25 grams each and the remaining *ganja* is sharply contradicted by the *Malkhana* register Ex.P.27-A which does not show that either the two samples or the remaining 4 kilograms and 950 grams *ganja* like substance was entrusted in a sealed condition at the *Malkhana.* Nandan Singh from whose kirana shop the scale and weights were called was also not examined. The seizure memo Ex.P.17 also does not bear a legible impression of the seal alleged to have been used for sealing the two samples. The report of F.S.L. Ex.P.28 bears a drawing of the seal found on the packet sent for examination. It does not show that it was a seal of any police station or any particular police officer. In view of the fact that the *Malkhana* register Ex.P.27-A does not show that the articles were entrusted in a sealed condition, the possibility that the sample sent for analysis could have been tampered with cannot be ruled out.

7. The order sheet dated 17.8.2004 of the trial Court clearly shows that the remaining sample packet and the substance alleged to have been sealed had not been produced before the Court as *Mudde Mal.* Had it been produced, it would have afforded an opportunity to the trial Court to verify if they were sealed and to make a comparison with the copy of seal drawn in the report of F.S.L. Due to non-production of the *Mudde Mal* and the remaining sample packet in the trial Court, adverse inference is drawn against the prosecution.

8. There is absolutely no evidence to show that the S.H.O. of outpost Pachpedi had affixed his seal on these two sample packets and the remaining *ganja* like substance. If Sub-Inspector N.L. Dhritlahre

(34)

was himself the S.H.O., it was incumbent upon him to have affixed the seal of the Police outpost Pachpedi on the sample packets. Specimen impression of the seal affixed on seizure memo Ex.P.17 does not appear to be an official seal. It appears to be some private seal which could be tampered with. In the above facts and circumstances, due to non-compliance of Section 55 of the Act, conviction of the appellant under Section 20 (b)(ii)(B) of the Act cannot be sustained under law.

9. In a case under Section 20(b)(ii)(B) based on a search of a dwelling house, the prosecution is required to lead cogent evidence to show that there was not sufficient time to obtain a search warrant from a Magistrate and the *ganja* was recovered from the conscious possession of the appellant. The certificate Ex.P.29 given by Sarpanch of Gram Panchayat Pachpedi shows that the house from where the *ganja* is alleged to have been seized is the ancestral house of the appellant in which the appellant lived with his family members. Sub-Inspector N.L.Dhritlahre has in paragraph 8 of his testimony stated that he made no efforts to find out the basis upon which the certificate was issued by the Sarpanch. Harobai P.W.4, the officiating Sarpanch of Pachpedi has in her testimony denied issuing any certificate to the police and has stated that she had merely affixed the thumb impression on the certificate. The independent witnesses who had signed the certificate were not examined by the prosecution. Sub-Inspector N.L.Dhritlahre P.W.2 has also not deposed that the *ganja* was recovered from the bed room of the appellant as was mentioned in the spot map Ex.P.18 or seizure memo Ex.P.12. N.L.Dhritlahre P.W.2 has deposed that after completing the necessary formalities relating to recording of secret information, recording of reasons for not obtaining search warrant

etc. the appellant was called at the police station. F.I.R. Ex.P.21 clearly shows that the house of the appellant is situated at a distance of about 1 furlong. It does not stand to reason why the appellant was called at the police station. If the appellant was called and was present at the outpost Pachpedi, then there was no possibility of his removing the *ganja* from his house to render the search futile. Document Ex.P.1 showing that due to the possibility of the appellant rendering the search futile by removing the *ganja* from his house a search warrant was not obtained from the Magistrate and N.L.Dhritlahre immediately proceeded to the spot is thus rendered doubtful since the appellant as well as the witnesses were called at the police station itself. In these circumstances, the testimony of Shyamlal P.W.6 appears to be true that the entire proceedings were conducted at the police station and not at the house of the appellant. The appellant is an illiterate villager and his thumb impressions were obtained on the documents of search & seizure at the police station itself. In view of the aforesaid facts and circumstances of the case, it is not proved beyond doubt that the *ganja* like substance alleged to have been seized from the house was in the conscious possession of the appellant.

10. Having thus considered the evidence led by the prosecution, the following points emerge:

a) Independent witnesses Shyamlal P.W.6 and Harobai P.W.4 did not support the prosecution.

b) Independent witness Harprasad though cited was not included in the trial programme and consequently was not examined by the prosecution.

c) The *Malkhana* register Ex.P.27-A sharply

contradicted the testimony of Sub-Inspector N.L.Dhritlahre that two samples and the remaining substance had been sealed by him.

d) There is total non-compliance of Section 55 of the Act.

e) The articles seized and the remaining sample packets were not produced in Court by the prosecution for which adverse inference is drawn.

f) The possibility that the substance examined by F.S.L. could have been tampered with cannot be ruled out.

g) It is not established beyond the shadow of the doubt that the substance was seized from the conscious possession of the appellant.

h) It cannot be ruled out that after calling the appellant, Sub-Inspector N.L.Dhritlahre prepared the search and seizure memo and all other documents at outpost Pachpedi and did not go to search the house of the appellant.

In view of the abovementioned facts and circumstances, conviction of the appellant under Section 20(b)(ii)(B) of the Act and the sentence awarded thereunder deserves to be set aside.

11. In the result, the appeal is allowed and conviction of the appellant under Section 20(b)(ii)(B) of the Act and the sentence awarded thereunder are set aside. The appellant is acquitted and shall be set at liberty forthwith, if not required in any other case. Fine if paid shall be refunded.

Sd/-
Dilip Raosaheb Deshmukh
Judge